Filed 1/28/13 In re Frank M. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re FRANK M., a Person Coming Under the Juvenile Court Law.	B238931
THE PEOPLE, Plaintiff and Respondent, v. FRANK M., Defendant and Appellant.	(Los Angeles County Super. Ct. No. VJ41971)

APPEAL from a judgment of the Superior Court of Los Angeles County. Philip K. Mautino, Judge. Affirmed in part, conditionally reversed in part, and remanded with directions.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court denied Frank M.'s motion to suppress and found that Frank committed the crime of carrying a concealed dirk or dagger. (Former Pen. Code, § 12020, subd. (a).) The court ordered Frank placed home on probation, with a stated maximum term of confinement not to exceed three years. We affirm the denial of Frank's motion to suppress; we conditionally reverse the adjudication with directions to the juvenile court on how to proceed upon remand.

FACTS

On November 18, 2011, at around 11:18 p.m., Los Angeles Sheriff's Department Deputy Jose Hernandez and his partner, Deputy Monty Gudino, were on patrol when they noticed a white van parked on the street in front of the Robledo family's home.[1] The van was impeding a traffic lane; its lights were off. The deputies stopped their patrol car and got out to investigate the van. When the deputies pointed their flashlights into the van, they saw four persons inside. Frank was sitting in the front passenger seat. Deputy Hernandez recognized a male in a back seat as "Avalos," a Pico Viejo gang member and the suspected gunman in a shooting that had occurred at a Walmart store a few weeks earlier. The deputies had been briefed on the investigation and had seen photos of Avalos and his white van.

After recognizing Avalos, Deputies Hernandez and Gudino detained everyone in the van. Deputy Gudino performed a patdown search on Frank and recovered a concealed knife in his rear pocket.

In November 2011, the People filed a petition pursuant to Welfare and Institutions Code section 602 alleging that Frank committed the crime of carrying a concealed dirk or dagger. (Former Pen. Code, § 12020, subd. (a).) At a hearing over two days in late January and early February 2012, the juvenile court denied Frank's motion to suppress the knife found in his pocket, and found Frank committed the alleged offense.

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[1] Deputy Hernandez knew that members of the Robledo family were connected to the Pico Viejo gang. Deputy Hernandez had arrested members of the gang on previous occasions at or near the home. Deputy Hernandez had previously arrested a member of the family who was affiliated with the gang.

Frank filed a timely appeal.

DISCUSSION

I. The Single Hearing Issue

Frank contends the juvenile court's judgment, including all orders from the denial of his motion to suppress, to adjudication, to disposition, must be reversed because the court erred in conducting a "simultaneous" hearing on his motion to suppress and on the adjudication of the alleged offense. Frank argues the unified hearing procedure violated Welfare and Institutions Code section 700.1,[2] and that the violation mandates reversal of all aspects of the juvenile court's proceedings in that the single hearing procedure violated his right to due process. We agree the juvenile court violated section 700.1, requiring a conditional reversal of the court's adjudication. However, we disagree that reversal of the denial of Frank's motion to suppress is mandated.

The Governing Law

In 1980, the Legislature enacted legislation governing the juvenile court law as it concerned motions to suppress evidence, judgments and appeals. (Stats. 1980, ch. 1095, pp. 3511-3512.) As relevant to Frank's current appeal, the 1980 legislation added section 700.1 to the juvenile court law. Section 700.1 currently reads:

"Any motion to suppress as evidence any tangible or intangible thing obtained as a result of an [alleged] unlawful search or seizure *shall be heard prior to the attachment of jeopardy* . . . .[3]

"If the court grants a motion to suppress prior to the attachment of jeopardy over the objection of the people, the court shall enter a judgment of dismissal as to all counts of the petition except those counts on which the prosecuting attorney elects to proceed pursuant to Section 701. . . ."

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[2] All further undesignated statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[3] Jeopardy attaches in a criminal juvenile proceeding "'when the first witness is sworn at the adjudicatory phase of the jurisdictional hearing'"; thereafter, a juvenile may not be retried unless there is a mistrial. (*In re Pedro C.* (1989) 215 Cal.App.3d 174, 180.)

The 1980 legislation also added section 800 to the juvenile law. As relevant to Frank's appeal, section 800 currently reads:

"(a) A judgment in a [juvenile criminal] proceeding . . . may be appealed from, by the minor, in the same manner as any final judgment . . . .

"A ruling on a motion to suppress pursuant to Section 700.1 shall be reviewed on appeal even if the judgment is predicated upon an admission of the allegations of the petition. [¶] . . . [¶]

"(b) An appeal may be taken by the people from any of the following:

"(1) A ruling on a motion to suppress pursuant to Section 700.1 even if the judgment is a dismissal of the petition or any count or counts of the petition. However, *no appeal by the people shall lie as to any count which, if the people are successful, will be the basis for further proceedings subjecting any person to double jeopardy. . . .*" (Italics added.)

The 1980 legislation replaced a "prior haphazard scheme" governing motions to suppress evidence in juvenile criminal proceedings, and appellate review of rulings on such motions. (*Abdullah B. v. Superior Court* (1982) 135 Cal.App.3d 838, 843.) The current statutory scheme expressly provides that a juvenile may make a pre-adjudication motion to suppress, "and permits review by *appeal* at the request of either the defendant or the prosecution." (*Ibid*.) But, under section 800, the People's right to appeal is limited in that the People have no right to appeal as to any count which, if the People's appeal succeeded, the juvenile would be subject to double jeopardy.

The Juvenile Court Setting

On Monday, January 30, 2012, the following colloquy took place between the court and Frank's defense counsel:

"THE COURT: . . . We are set for a trial today. And concurrently with that, we're going to hear a 700.1 motion. And all the evidence in the trial will be relevant to the 700.1 motion and all the 701 [*sic*] evidence will also be applied to the trial.

"Any objection by either party?

"[DEFENSE COUNSEL]: Just to be clear, Your Honor, initially, we planned just on doing the motion.

"THE COURT: I always join them together and we hear them all at the same time.

"If you want to be heard, I'll give you a chance to be heard, but that's what I'm going to do.

"[DEFENSE COUNSEL]: Initially, it was the defense's position that we were looking to do a potentially dispositive motion. And if the motion's lost, then negotiate a disposition with the People.

"THE COURT: I'm not going to do that. We'll hear them both at once and the 700 [*sic*] will be applied to the trial and vice versa.

"[DEFENSE COUNSEL]: If I could just have a moment to explain to my client that real[i]ty."

A moment later, Deputy Hernandez was sworn and testified regarding the events on the evening of November 18, 2011. After Deputy Hernandez finished testifying, the court granted the prosecutor's request for a continuance. On Thursday, February 2, 2012, Deputy Gudino testified. The deputies' testimony established the facts that are summarized above. After Deputy Gudino finished testifying, the court heard argument on Frank's motion to suppress, and denied the motion. Frank then rested without presenting any defense evidence. The court then heard argument on the adjudication of the charged offense and found that Frank possessed a concealed dirk or dagger.

Analysis

As noted above, section 700.1 provides that a motion to suppress "shall be heard *prior* to the attachment of jeopardy . . . ," (italics added) i.e., prior to the first witness being sworn at the adjudicatory phase of a juvenile proceeding. The record shows that the juvenile court violated section 700.1 in Frank's case. The court did not hear Frank's motion to suppress *prior* to Deputy Hernandez being sworn for the adjudicatory phase of Frank's case.

We understand the juvenile court's concerns for efficiency, and in not making witnesses come to court for multiple rounds of testimony. However, such concerns do not trump the express command of section 700.1. Under section 700.1, the court was required to hear Frank's motion to suppress prior to the first witness being sworn at the adjudicatory phase.[4]

Given that there was a violation of section 700.1 in Frank's case, the issue for this court on appeal is what to do about the violation. Frank argues every aspect of his case must be tossed on the ash heap. We disagree.

In *In re Mitchell G.* (1990) 226 Cal.App.3d 66 (*Mitchell G.*), Division Four of our court addressed a juvenile case implicating sections 700.1 and 800. In *Mitchell G.*, the People filed a petition charging a juvenile with firearm and ammunition charges. The juvenile filed a motion to suppress pursuant to section 700.1, apparently arguing the items had been seized in the course of a search incident to an arrest without probable cause. The juvenile court held a combined adjudication and suppression hearing after obtaining a stipulation from defense counsel " 'that the testimony that is taken on the section 700.1 motion be as to the adjudication also.' " (*Mitchell G.*, at p. 69.) The arresting officer was then sworn and gave his account of how he came to find the firearm and ammunition on the juvenile. After the testimony, the court granted the juvenile's motion to suppress, and the prosecutor stated that the People could not proceed without the suppressed evidence. The court dismissed the petition, and the People filed an appeal. The juvenile argued to Division Four that the People's appeal should be dismissed under section 800. (*Mitchell G.*, at pp. 68, 71-72.)

Division Four summarized the case circumstances as follows: "It appears that in an effort to save a little time, the trial court asked the minor to stipulate to concurrent hearings without considering the double jeopardy consequences that would follow if the

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[4] The interest in efficiency could have been addressed by procedural paths other than violating section 700.1. For example, the court could have heard the evidence on Frank's motion to suppress, and ruled on the motion, and then, after ruling, inquired whether the parties would stipulate that the evidence could be used for purposes of the adjudication of the charged offense.

suppression motion were granted. The People could have objected to the procedure, pointing to [section 700.1] and the double jeopardy problem it seeks to avoid. The People or the court also could have conditioned the dual purpose hearing on a waiver by the minor of his right against double jeopardy in the event that the case was dismissed because of an order suppressing evidence. But there was no objection and there was no waiver." (*Mitchell G., supra*, 226 Cal.App.3d at p. 71.)

Division Four then explained that because jeopardy attached when the arresting officer was sworn in the context of adjudication, and because there had been a dismissal, double jeopardy prohibited any further proceedings against the juvenile. Under section 800, concluded Division Four, this included the People's appeal. Accordingly, Division Four dismissed the appeal. (*Mitchell G., supra*, 226 Cal.App.3d at pp. 71-72.)

Mitchell G. illustrates the purpose of sections 700.1 and 800 in requiring that a hearing on a suppression motion be heard prior to the attachment of jeopardy and in prescribing rules governing appeal of a ruling on such a motion. One such purpose is to avoid a potential double jeopardy problem in the event the motion is granted. But we do not understand *Mitchell G*. to support Frank's argument here that the failure to hold a hearing on a motion to suppress prior to the attachment of jeopardy, in violation of section 700.1, means that every aspect of a juvenile proceeding must all be reversed as a violation of due process.

We see nothing in the plain language of the statutes or in the published cases to support Frank's argument that a ruling on a motion to suppress, which is not otherwise shown to be incorrect but for a violation of section 700.1, cannot be allowed to stand. At the same time, we cannot find that a violation of section 700.1 has no remedy. To do so would effectively mean that section 700.1 has no meaning or purpose. *Mitchell G*. teaches that if section 700 is violated by a hearing a juvenile's motion to suppress unified with an adjudication of a charged offense, the People assume the risk that there will be no right to appeal in the event the motion to suppress is granted. We have a different setting here than in *Mitchell G*. because Frank's motion to suppress was denied. But we add to *Mitchell G.* that if section 700.1 is violated by holding a single hearing on a motion to

suppress and on the adjudication of a charged offense, an ensuing adjudication cannot be allowed to stand unless the error is found to be harmless.[5]

The People assert that this claim should be examined and decided in light of the constitutional test for harmless error. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) We agree this is the appropriate standard. Under this test, we may not find the error harmless unless we are convinced beyond a reasonable doubt that the result of Frank's case would have been the same absent the asserted error. Frank argues he suffered prejudice because he would have been able to seek deferred entry of judgment (DEJ), or negotiate a disposition with the prosecution, after a ruling on his motion to suppress, but before he was adjudged a ward of the court. We find merit in Frank's contention, in part.

First, we are not persuaded the record establishes that Frank may have been able to negotiate a better outcome in his case had the juvenile court followed a separate-hearing procedure. There is no indication in the record that there was an offer made to Frank or that he would have accepted it.

On the other hand, we have significant concerns about the issue of DEJ to find the court's adjudication finding should not stand. The statutes governing DEJ procedure "apply whenever a case is before the juvenile court for a determination of whether a minor is a person described in section 602," if certain circumstances exist. (§ 790.) A court is required to follow specified procedures and exercise discretion to determine whether a minor is eligible for DEJ. (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123.)

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[5] We also disagree with Frank to the extent he relies on *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, to argue his due process rights were violated. Frank claims that *Hicks* mandates reversal because he had an "expectation" that jeopardy would attach only after the adjudication hearing, after his suppression motion had been heard and denied. In *Hicks*, the Supreme Court of the United States held that it violates due process of law for a convicted state prisoner to be sentenced under a mandatory punishment statute where, under state law, he is entitled to the benefit of a discretionary state sentencing statute. We find no analogous due process violation here. Expectations alone do not form the basis for reversal. Even if they did, Frank had no legitimate expectation of jeopardy attaching in light of the state and federal harmless error analysis that applies to this appeal.

If the court finds that Frank is eligible for DEJ, and if Frank is willing to admit the offense, a DEJ program may be appropriate. If Frank successfully completes the program, the charges against him will be dismissed and the record sealed. (§ 793, subd. (c).) DEJ is not be available in the postadjudication setting. The DEJ procedure allows a minor to *admit the allegations of a petition* and to complete a period of probation, including participation in programs designated by the juvenile court. (§§ 791-794.)

The People correctly observe that there is nothing in the record to indicate that Frank was previously considered for DEJ. There is no evidence the prosecutor filed a DEJ document stating Frank's eligibility, or that Frank was notified regarding eligibility for a DEJ program. The record also does not show that the juvenile court held a suitability hearing, and does not show that the court undertook the task of determining whether Frank would be offered a DEJ program.

We recognize that the juvenile court is not mandated to place Frank in DEJ, and that he may be found unsuitable for the program. The juvenile court has *discretion* to place an eligible minor charged with a felony in the DEJ program. (§ 790.) However, the People concede that based on Frank's offense and lack of prior record, he may be eligible for DEJ. Further, that this case must be remanded to the juvenile court for a determination on whether he is eligible for DEJ. We cannot find the error in holding a consolidated suppression motion and adjudication hearing is harmless under these circumstances. Frank may be eligible for DEJ, successfully complete the program and have his charge dismissed.

As a result, we find this error with the DEJ process requires remand for further proceedings. (*In re Luis B.*, *supra*, 142 Cal.App.4th at p. 1123.) We set aside the juvenile court's adjudication findings and dispositional orders for further proceedings in compliance with the DEJ statutes. (§ 790 et seq.) If the court grants DEJ to Frank, then it shall issue an order vacating its findings and orders, and proceed accordingly. If the court denies DEJ to Frank, then it should make orders continuing in effect the judgment,

subject to Frank's right to appeal the denial of DEJ. (*In re Luis B., supra,* at pp. 1123-1124.)

II. The Motion to Suppress

Frank contends the juvenile court erred in denying his motion to suppress. We disagree.

The Fourth Amendment permits a police officer to detain a person for purposes of an investigation when the officer has a reasonable suspicion, based on articulable facts, that the person has been, is, or is about to be engaged in criminal activity. (*Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*); *In re Tony C.* (1978) 21 Cal.3d 888.) To satisfy the requirement of reasonable suspicion, a police officer must point to specific articulable facts that, considered in light of the totality of the circumstances, provide an objective manifestation that the person to be detained may have been or is involved in criminal activity. (*People v. Souza* (1994) 9 Cal.4th 224, 231.) A police officer who properly detains a person based on reasonable suspicion is permitted to protect the officer's safety and the safety of others by performing a patdown search, provided the officer has a reasonable suspicion that the person detained may be armed and dangerous. (*Arizona v. Johnson* (2009) 555 U.S. 323, 330-334; *Terry*, *supra*, at pp. 27, 30.) The test for a permissible patdown search is whether a reasonably prudent police officer in the circumstances would be warranted in the belief that his or her safety or the safety of others was in danger. (*Terry, supra,* at p. 27.) The officer does not need to be certain that the person is in fact armed. (*Ibid*.)

In addressing a defendant's claim on appeal that the trial court erred in denying a suppression motion, a reviewing court defers to the trial court's factual findings, express or implied, where those facts are supported by substantial evidence; the reviewing court exercises its independent judgment in determining whether, under the facts found by the trial court, the police conducted a constitutionally permissible search. (*People v. Tully* (2012) 54 Cal.4th 952, 979.)

We find the detention and patdown search did not violate constitutional precepts. As a starting point, the deputies here did nothing improper in deciding to investigate the parked van; it was impeding a traffic lane. The deputies here were within their rights to next order all of the occupants out of the van. First, a police officer conducting a traffic stop may seize everyone in a vehicle, not just the driver, because such stops have inherent potential for putting officer safety at risk. (See *Brendlin v. California* (2007) 551 U.S. 249, 255; *Maryland v. Wilson* (1997) 519 U.S. 408, 410.) Second, the deputies here recognized Avalos in the back seat of the van, and knew he was a gang member and the suspected gunman in a shooting. Moreover, the deputies were in front of known gang-related residence, late at night, and were outnumbered by the occupants in the van. We have no reservation in finding that the deputies were constitutionally permitted to investigate beyond a mere traffic stop. The deputies had reasonable grounds to believe their safety was at risk. Removing all of the occupants from the van and detaining them for the duration of an investigation was constitutionally permissible under the totality of the circumstances.

The deputies were also well within constitutional bounds in conducting a patdown search of Frank after he was removed from the van. Again, the circumstances provided reasonable grounds for the deputies to check for possible weapons in the interests of their safety. Frank was in the van, in a gang area, in close proximity to a known gang member who was a suspect in a shooting. (*In re Frank V.* (1991) 233 Cal.App.3d 1232, 1241; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 382.) The setting is also relevant. As noted, the search occurred in a known gang area, late at night, and the deputies were outnumbered by the occupants in the van. (*People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1230; *People v. Limon* (1993) 17 Cal.App.4th 524, 534; *People v. Satchell* (1978) 81 Cal.App.3d 347, 354.) In light of all factors, it was reasonable for Deputy Gudino to patdown Frank.

Frank's arguments on appeal do not convince us that more was needed under *Terry* for a patdown search. His reliance on *People v. Medina* (2003) 110 Cal.App.4th 171 and *People v. Sandoval* (2008) 163 Cal.App.4th 205 for a different conclusion on constitutionality is not persuasive. In *Medina*, the defendant was stopped for having a broken taillight; he was not in the company of a shooting suspect. (*Medina*, at p. 176.) In *Medina*, the police officer conducted a patdown search because it was the officer's " 'standard procedure.' " (*Ibid*.) In Frank's current case, the deputies conducted a patdown search because they encountered a group of people, in a gang area, late at night, in the company of a known gang member who was a suspect in a shooting. Frank's case is nothing like *Medina*. In *Sandoval*, the police officer never testified he thought the defendant might be armed, and, in fact, testified that he "had no reason to believe the defendant was armed." (*Sandoval*, at p. 212.) Again, Frank's current case is markedly different on the facts.

In the final analysis, Frank's argument that the deputies were justified in frisking Avalos, only, and not Frank, is defeated by the circumstances confronting the deputies as they investigated the van. The fact that Frank was not a suspect in the earlier shooting does not necessarily defeat the deputies' constitutional authority to patdown search him. The factors we discussed above are sufficient even though Frank was not a suspect. *In re Stephen L.* (1984) 162 Cal.App.3d 257 is instructive. In *Stephen L.*, police officers investigating gang graffiti crimes saw six individuals standing next to a wall that had been recently vandalized. Four of the individuals were known gang members. As the officers walked toward the group, everyone started walking away in different directions. The officers detained everyone, performed patdown searches, and found a knife on the defendant. (*Id*. at pp. 259-260.) Division One of our court rejected the argument that the officers went too far in conducting a patdown search of the defendant: "We are mystified . . . what improvement in conduct we are being urged to require of police officers in a situation such as here presented. . . . The investigation of vandalism and persons found next to new instances of the same is an activity for which police officers are hired. Failure to cursorily search suspects for weapons in a confrontation situation in

an area where gang activity and weapon usage is known from the officers' past experience would be most careless. Furthermore, it is the character of the incident and not the degree of acquaintanceship with suspects which should determine the conduct of a conscientious police officer. (Thus, it certainly should not be contended that the police officers were entitled to patdown search only the four suspects they previously knew and not the Minor who was an integral part of the group found next to the vandalized wall.)" (*Id.* at p. 260.)

We have the same sentiments about Frank's current case.

III. The Continuance Issue

Frank also contends the juvenile court's judgment must be reversed because the court abused its discretion in granting the People's mid-hearing request for a continuance. We disagree.

The Setting

As noted above, there were two witnesses for the People — Deputies Hernandez and Gudino. Deputy Hernandez testified on Monday, January 30, 2012. After Deputy Hernandez finished testifying, the prosecutor advised the court that the People would "have to rest" because Deputy Gudino was "unavailable." The court replied: "Well, the court will grant a reasonable continuance if you wish to have some time to bring [Deputy Gudino] into court." Deputy Hernandez then interposed to explain that one of Deputy Gudino's relatives, whom he believed was his uncle, had a heart attack over the weekend. The two detectives had worked together for a few days after the incident, but then Deputy Hernandez told Deputy Gudino, "If your mind's not in the game, you need to take some time off." Deputy Gudino agreed, and had talked to their lieutenant, and he was granted a week off. Deputy Hernandez represented that Deputy Gudino would be available "anytime Wednesday, Thursday or Friday." The prosecutor then moved for a continuance. Over a defense objection, the court continued the hearing to Thursday, February 2.

Analysis

A court may grant a continuance in a criminal trial or a juvenile criminal matter only for good cause shown. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118; *In re Maurice E.* (2005) 132 Cal.App.4th 474, 477.) The decision to grant or deny a continuance in the midst of a trial " 'rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, . . . and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.' " (*People v. Zapien* (1993) 4 Cal.4th 929, 972.) In the absence of a showing of an abuse of discretion and prejudice, a ruling on a motion for a continuance does not require reversal of a conviction. (*Ibid*. [addressed in context of a denial of a defendant's motion for a continuance].) In summary, a trial court may not exercise its discretion over continuances so as to deprive a defendant of a fundamental right, such as his or her right to prepare a defense, or to effective assistance of counsel. (See *People v. Snow* (2003) 30 Cal.4th 43, 70; see also *Hughes v. Superior Court* (1980) 106 Cal.App.3d 1, 4.)

We find reversal is not required because the juvenile court's decision to grant a continuance did not deprive Frank of any cognizable fundamental right. The continuance did not affect Frank's ability or opportunity to prepare a defense or the performance of his counsel. To the extent Frank argues the absence of Deputy Gudino left the prosecution with a hole in its case, we are not persuaded that reversal is required. The absence of a witness is the very type of trial event for which continuances are commonly granted. Frank's reliance on the "subpoenaed witness vs. unsubpoenaed witness" cases for the rule that a showing of due diligence is required before good cause may be found for a continuance, similarly do not persuade us that reversal is required. Deputy Gudino was not absent from the first day of trial because the prosecutor failed to subpoena him for trial; he was absent because there was a family tragedy. None of the cases cited by Frank support the proposition that a continuance may not be granted to accommodate a witness's family emergency. Our conclusion that reversal is not required is the same

under any applicable standard of review. (Compare *People v. Watson* (1956) 46 Cal.2d 818 with *Chapman, supra,* 386 U.S. 18.)

DISPOSITION

The juvenile court's order denying Frank's motion to suppress is affirmed; the adjudication is reversed conditionally, and the cause is remanded for further proceedings in accord with this opinion.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.